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No. 88-1469

In the Supreme Court of the United States

OCTOBER TERM, 1988

DAVID AVALOS AND SUSHI, INC., PETITIONERS

v.

GORDON THOMPSON, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioners' appeal in a constitutional tort action against General Services Administration (GSA) employees after petitioners failed to prosecute an action under the Administrative Procedure Act against the GSA that could have redressed their alleged injury.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS[1] IN OPPOSITION

OPINIONS BELOW

The following decisions are unreported: the August 12, 1988 order of the court of appeals dismissing the appeal without prejudice (Pet. App. A1); the April 16, 1987 decision of the district court on the immunity issue (Pet. App. A3-A29); the March 9, 1988 district court decision after trial on the APA issue (Thompson Br. in Opp. App. A3-A22); and the November 10, 1988 order of the district court dismissing the case for failure to prosecute (App., *infra*, 1a).

[1] This brief is filed on behalf of respondents Hamilton and Waggoner. Judge Thompson is represented by private counsel, who have filed a brief in opposition to certiorari on his behalf.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1988. A petition for rehearing was denied on December 7, 1988 (Pet. App. A2). The petition for a writ of certiorari was filed on March 6, 1989. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Public Buildings Cooperative Use Act of 1976, Pub. L. No. 94-541, 90 Stat. 2505, was enacted to encourage the occasional use of areas in and around public buildings for cultural, educational, and recreational activities. Regulations promulgated by the Administrator of the General Services Administration (GSA) require an individual wishing to use the area surrounding a public building to obtain a permit from the GSA building manager. 41 C.F.R. 101-20.702 (1981).[2] The permit application must contain a description of the activity or item proposed for display and the dates and hours during which the activity is to be carried out. *Ibid.* The building manager may deny or revoke a permit if, *inter alia*, the application is intentionally false or incomplete or the proposed use disrupts official business or hinders access to the public area. 41 C.F.R. 101-20.703. If a permit is denied or revoked, an applicant may seek informal review by the GSA regional officer. 41 C.F.R. 101-20.704.[3]

2. Petitioner Avalos, an artist, submitted an application for a permit to display an artwork, "San Diego Don-

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[2] C.F.R. citations are to the 1981 edition. See App., *infra*, 5a-9a. The regulations have been recodified, and are presently located at 41 C.F.R. 101-20.400 *et seq.*

[3] A permit applicant must be provided the opportunity to present oral and written materials to the GSA reviewing officer, who is required to render a decision within ten days of receiving notice of appeal. 41 C.F.R. 101-20.704(b) and (c).

key Cart," in the courtyard of the building housing the United States District Court for the Southern District of California. The GSA granted the permit for the period January 4, 1986, through January 17, 1986 (Pet. App. A5). In response to a GSA clerical employee's expression of concern about security, Avalos decided to add a chain and barbed wire fence around the artwork, but did not amend his permit to reflect that alteration (*ibid.*).

After installation of the artwork, a member of the security staff of the federal courthouse building advised Chief Judge Gordon Thompson, Jr. that the art work was a security problem because the surrounding fence prevented proper surveillance of the sculpture and its immediate area (Pet. App. A5-A6). After consultation with other judges of the district court, the Chief Judge wrote a memorandum to respondent Paul Hamilton, the GSA Field Office Manager in San Diego and the GSA manager of the courthouse building, directing him, "[f]or security reasons," to "cause the removal" of the work of art from the front of the federal courthouse (*id.* at A6). Hamilton advised the artist by telephone that Judge Thompson had directed the removal of the artwork. After Avalos took no action, GSA informed him by mail that his permit had been revoked under GSA regulations due to "considerations for the security of the building and its occupants" (*id.* at A7). When Avalos failed to remove the artwork, GSA personnel dismantled and stored it in an adjacent building (*id.* at A6-A7).

3. On January 10, 1986, Avalos took an administrative appeal from the decision to revoke his permit. In accordance with applicable GSA regulations, the administrative appeal was reviewed by the GSA regional of-

ficer, Phillip Waggoner. Waggoner contacted Avalos to inquire whether he wished to submit further materials, but Avalos declined (Pet. App. A8). On January 23, 1986, Waggoner denied the administrative appeal, ruling that the issue was moot because the period for displaying the work of art had expired, and that, in any event, the display violated 41 C.F.R. 101-20.702 because it differed significantly from the work described in the original permit application (Pet. App. A8).

On the day of his administrative appeal, Avalos and his art gallery (Sushi, Inc.) also filed a complaint in federal district court alleging that the removal of the artwork violated the First Amendment of the Constitution (Pet. App. A9). Relying on *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971), the complaint, as amended following denial of Avalos's administrative appeal, sought damages against Judge Thompson and GSA officials Hamilton and Waggoner in their individual capacity, as well as injunctive relief against these officials "apparently in their individual capacity" (Pet. App. A26). The complaint also sought review under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, of the GSA decision revoking the permit.

On April 16, the district court granted the motions for summary judgment filed by the individual defendants, holding that all three were shielded from *Bivens* liability by qualified immunity (Pet. App. A3-A29). Applying the objective standard for qualified immunity articulated by this Court in *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), the court concluded that Judge Thompson, in ordering the artwork removed in response to a "perceived security problem" (Pet. App. A21), had acted pursuant to his legi-

timate authority over court security matters,[4] and had violated no "clearly established law" (*id.* at A19-A21).[5] With respect to Waggoner and Hamilton, the court explained that they were entitled to qualified immunity because they had acted "under the compulsion of an Article III judge's order * * * [and] there is no clearly established authority showing that they need not obey that order" (Pet. App. A25). The court also noted that both officials took action "in a legalistic manner under the [GSA] regulations," and concluded that the availability of APA review of the agency's decision as an alternative means for redressing petitioners' alleged injury barred *Bivens* relief (Pet. App. A25-A26). The court explained, in particular, that there was "no legitimate claim for an injunction against Hamilton and Waggoner individually" (Pet. App. A26) because "an injunction is among the remedies available against the agency for the agency action" that petitioners sought to remedy. With respect to the claim under the APA that the GSA had improperly revoked the artist's permit, the court found that there were disputed issues of fact and set the question for trial (Pet. App. A26-A29).

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[4] The court noted (Pet. App. A19-A20) that the Federal Protective Service (an agency of the GSA) and the United States Marshal (under the direction of the judges) had overlapping responsibility for courthouse security. It rejected petitioners' contention that the judges had no legitimate authority over security, citing Local Rule 122, adopted by the United States District Court for the Southern District of California, which provides:

> The court, or any judge may from time to time make such orders or impose such requirements as may be reasonably necessary to assure the security of the court and of all persons in attendance.

[5] The court also ruled that it had no authority to grant an injunction "to direct the Chief Judge of a federal district court as to the manner in which he must perform those duties" (Pet. App. A22).

4. Petitioners appealed the entry of judgment in favor of respondents on qualified immunity grounds.[6] While the appeal was pending, the district court ruled on the APA issue. The court determined that, to the extent the permit revocation rested on a theory of mootness, the revocation was arbitrary and capricious (Thompson Br. in Opp. App. A15). The court also ruled that while the second ground relied upon by the agency—the filing by Avalos of an incomplete application—"has a basis in the facts," (*ibid.*) and was "supported by substantial evidence" (*id.* at A17), the review was procedurally deficient because Avalos was not given an opportunity to explain in person his decision to alter his artwork by adding a fence. The court vacated the GSA decision and remanded the matter to the agency for further consideration, expressly setting forth constitutional principles to guide the agency on remand (*id.* at A18-A21).

The GSA thereafter notified Avalos that, in accordance with the district court judgment, "we are now prepared to reconsider your application for a permit to display your work" (Thompson Br. in Opp. App. A40-A41). The letter asked him to resubmit a complete description of the proposed exhibit and to suggest dates and a location for the display. *Ibid.* Avalos refused to comply with the request and stated in a May 27 letter to the GSA that he would "not enter into discussions or negotiations or any other kind of activity with G.S.A." (*id.* at A42-A43). On August 12, the court of appeals, which had stayed petitioners' immunity appeal pending the outcome of the remand proceedings ordered by the district court (App., *infra*, 3a), ordered the appeal dismissed without prejudice (Pet. App. A1). On November 11, 1988, the district court, in light of Avalos's unwillingness to participate in the proceedings on remand, entered a final judgment dismissing the action

[6] The district court certified the judgment as final and appealable under Fed. R. Civ. P. 54(b) (Pet. 5).

"for failure to prosecute" (App., *infra*, 1a).[7] Finally, on December 7, the court of appeals denied petitioners' rehearing petition (Pet. App. A2).[8]

ARGUMENT

On the basis of the district court's correct determination that the availability of administrative relief precluded a *Bivens* action, the court of appeals appropriately dismissed the appeal. In any event, petitioners cannot prevail in a *Bivens* action against respondents Waggoner and Hamilton because, as the district court held, those respondents were entitled to qualified immunity. Accordingly, further review by this Court is not warranted.

1. As the district court observed (Pet. App. A26), a *Bivens* action may not be appropriate where alternative legal action provides substantially equivalent relief. See *Bush* v. *Lucas*, 462 U.S. 367, 377 & n.13 (1983); *Schweiker* v. *Chilicky*, 108 S. Ct. 2460, 2468-2471 (1988). In this case, a *Bivens* action for damages is not "the only realistic avenue for vindication of constitutional guarantees." *Anderson* v. *Creighton*, 107 S. Ct. 3034, 3038 (1987), quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982). Resolution of the APA issue in petitioner Avalos's favor on remand would have completely rectified any First Amendment violation.[9]

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[7] The district court had earlier dismissed petitioner Sushi, Inc.'s action against the GSA for lack of standing (Thompson Br. in Opp. App. A23-A24).

[8] Pursuant to a request by the court of appeals on October 20, 1988 (App., *infra*, 4a), the parties continued to notify the court of the status of the GSA proceedings in late October and November (Thompson Br. in Opp. App. A25-A30).

[9] Such a resolution would have obviated a *Bivens* action not only by Avalos but also by petitioner Sushi, Inc.

Plainly, there was no need for the court to consider petitioners' request for an injunction against Waggoner and Hamilton for their role

The refusal to pursue procedures for the GSA's reconsideration of the permit revocation and to supply information that would have enabled the agency to comply with the district court's directives constituted a clear failure to prosecute, as the district court later held. Thus, the court of appeals was justified in dismissing petitioners' *Bivens* appeal.

2. Even if petitioners' *Bivens* cause of action was valid, the district court correctly determined that respondents Hamilton and Waggoner were entitled to qualified immunity. This Court has made clear that government officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. at 818; *Anderson* v. *Creighton*, 107 S.

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in the revocation of the permit, since an injunction was available in the APA action. Pet. App. A26. Indeed, the fact that the relief petitioners sought was available through APA review of the agency's action reveals that petitioners' real complaint was with agency procedures and the agency's revocation of the permit. For this reason, the appropriate avenue for relief was through appeal of the GSA's determination, not through a *Bivens* action against GSA officials in their individual capacity. See *Clemente* v. *United States*, 766 F.2d 1358, 1364-1365 & n.10 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

Although damages are not available under the GSA regulations or the APA, petitioners sought damages "only as an alternative remedy" (Pet. App. A9). Moreover, petitioners allege no separate injury apart from the deprivation of the opportunity to display the artwork. Nor do they contend that their injury cannot be entirely redressed through reconsideration of the permit revocation. Compare *Carlson* v. *Green*, 446 U.S. 14, 18-20 (1979) (action for compensatory and punitive damages for Eighth Amendment violation of a prisoner's rights is not precluded by the availability of an action against the United States under the Federal Tort Claims Act).

Ct. 3034 (1987). In deciding whether an official is entitled to qualified immunity, a court must determine whether a reasonable official "in light of clearly established law and the [factual] information [he] possessed," could reasonably have believed that his behavior was lawful. 107 S. Ct. at 3040.

Under this test, the district court correctly held that Hamilton and Waggoner are entitled to qualified immunity. In light of the official perception of a security risk on public property, and the statutory and regulatory authority of the judges and the GSA to respond to that risk, these respondents' official actions surely did not violate First Amendment rights that were clearly established, if indeed such rights were violated at all. Cf. *Anderson* v. *Creighton,* 107 S. Ct. at 3039 ("in the light of preexisting law," the unlawfulness of the particularized official action "must be apparent"). Respondent Hamilton, the GSA manager of the federal courthouse building, simply followed Judge Thompson's order by informing Avalos that the Judge had ordered the artwork removed and by dismantling the display. Hamilton's decision to follow an order of the Chief Judge of the United States District Court – who was empowered by a local rule to "make such orders or impose such requirements as may be reasonably necessary to assure the security of the court and of all persons in attendance" (see note 4, *supra*) – can hardly be characterized as a violation of a clearly established right belonging to petitioners.

Petitioners' case against respondent Waggoner is also without merit. Waggoner, as the "regional officer" assigned to the San Diego area, was the person empowered by regulation to hear petitioners' administrative appeal. He did not violate any clearly established constitutional

right merely by carrying out a lawfully imposed and narrowly prescribed obligation to hear an appeal of an administrative decision.

In sum, the reasons advanced by the district court for rejecting petitioners' *Bivens* claim against respondents and for dismissing the APA action for failure to prosecute show beyond doubt that the appeals court was justified in dismissing the complaint.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1989

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 86-043-HLH

AVALOS

v.

GENERAL SERVICES ADMINISTRATION

Date 11/10/88

Present: HON. HARRY L. HUPP, Judge
ROBERT BOLTON, Deputy Clerk
Attorneys present for Plaintiffs:
Attorneys present for Defendants:

PROCEEDINGS:
Order following OSC re determination of final judgment

ORDER (also, if applicable, findings and memorandum opinion):

On March 9, 1988, the court entered an interlocutory judgment remanding the case to GSA for further administrative action following its determination that the administrative action which was the subject of this

proceeding must be set aside for further proceedings. Subsequent status reports from the parties lead the court to the conclusion that plaintiff has failed to prosecute further administrative proceedings and is satisfied to have the order setting aside the previous administrative action stand as final judgment in the action without seeking further administrative relief.

Accordingly, it is ordered that the interlocutory judgment setting aside the previous administrative action is now a final judgment (for purposes of Rule 54). The court further determines that the order for further administrative proceedings is no longer effective for failure to prosecute and that no further action is required by the judgment. Any requests for further relief under the judgment is dismissed. This order terminates this action.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CA# 87-5939

DAVID AVALOS, ET AL., PLAINTIFFS/APPELLANTS

v.

GENERAL SERVICES ADMINISTRATION, ET AL.,
DEFENDANTS/APPELLEES

[Filed Mar. 10, 1988]

Before: FARRIS, NORRIS and REINHARDT, Circuit Judges

Oral argument is continued until Judge Hupp's proposed order has been entered and General Services Administration has responded to that order or for 60 days whichever first occurs. The panel will remain the same.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-5939

DAVID AVALOS AND SUSHI, INC., PLAINTIFFS-APPELLANTS

v.

GENERAL SERVICES ADMINISTRATION;
HON. GORDON THOMPSON, JR.; PAUL HAMILTON;
PHILIP WAGGONER, DEFENDANTS-APPELLEES

[Filed Oct. 20, 1988]

Before: FARRIS, NORRIS and REINHARDT, Circuit Judges

The parties are requested to advise the court, no later than November 2, 1988, of the status of any further General Services Administration remand proceedings since June 28, 1988.

41 C.F.R. (1981):

§ 101-20.701 Definitions.

* * * * *

(h) "Cultural activities" shall mean activities, including but not limited to films, dramatics, dances, and musical presentations, and fine art exhibits, whether or not these activities are intended to make a profit.

* * * * *

§ 101-20.702 Permits.

(a) *Application.* Any person or organization desiring to use a public area of a public building or its grounds shall first obtain a permit from the buildings manager. To obtain this permit, a copy, sample, or description of any material or item proposed for distribution or display and a written statement shall be submitted setting forth the following:

(1) The full name, mailing address, and telephone number of the applicant;

(2) The full name, mailing address, and telephone number of the person or organization sponsoring, promoting, or conducting the proposed activity;

(3) The full name, mailing address, and telephone number of the individual person or persons who will have supervision of and responsibility for the proposed activity;

(4) A description of the proposed activity;

(5) The proposed dates and hours during which the activity is to be carried out; and

(6) The approximate number of persons to be engaged in this activity, if known.

(b) *Applicants authority.* If the applicant claims to represent an organization, a letter or other documentation

is required showing that the applicant has authority to represent that organization.

(c) *Applications for permit to solicit contributions.* Any person or organization desiring to use a public area of a public building or its grounds for purposes of soliciting funds not prohibited by § 101-20.308 shall, in addition to the above requirements, submit a statement signed by the applicant that the:

(1) Applicant represents and will be soliciting funds for the sole benefit of a religion or religious group;

(2) Applicant's organizaton has received an official Internal Revenue Service (IRS) ruling or letter of determination stating that the organization or its parent organization qualifies for tax-exempt status under 26 U.S.C. 501 (c)(3), (c)(4), or (c)(5); or

(3) Applicant's organization has applied to the IRS for a determination of tax-exempt status under 26 U.S.C. 501 (c)(3), (c)(4), or (c)(5), and that the IRS has not yet issued a final administrative ruling or determination of this status.

(d) *Failure to complete application.* Failure to submit the information required by paragraphs (a), (b), and (c), of this section shall result in denial of a permit.

(e) *Filing.* Applications shall be filed during regular working hours in the buildings manager's office or such other place as he or she may designate. Applications may be submitted by mail or in person.

(f) *Permit issuance.* A single permit shall be issued within 10 days following receipt of the completed application by the buildings manager.

(1) Each permit shall authorize the permittee to conduct the activity for the period of time requested; provided that a permit shall not be issued for a period of time in excess of 30 calendar days, unless specifically approved by the regional officer. After the expiration of the permit, a

new permit may be issued to the former permit holder upon submission of a new application. In such a case, applicants may be permitted to incorporate by reference any required information or documentation filed with a previous application.

(2) If permits are requested for the same public area for the same time period, the building manager will issue permits on a first-come-first-served basis.

§ 101-20.703 Disapproval of application of cancellation of permit.

(a) *Grounds for disapproval or cancellation.* The buildings manager shall disapprove any application or cancel an issued permit for use of a public area if the proposed use:

(1) Is a commercial activity as defined in § 101-20.701(k);

(2) Obstructs the free ingress and egress of the users of the public area;

(3) Damages the public building or any property within the public building;

(4) Disrupts the official business of the agency or agencies occupying the public buildings;

(5) Interferes with a tenant's quiet enjoyment of their leasehold;

(6) Interferes with a previously approved use of the public area by another member, or members, of the public;

(7) Is obscene within the meaning of obscenity in 18 U.S.C. 1461-65;

(8) Pertains to any judicial proceeding then pending in the public building and this use is intended to influence or impede the judicial proceeding;

(9) Is in violation of the prohibition against political solicitations in 18 U.S.C. 603; or

(10) Is being conducted with a permit issued in response to an intentionally false or incomplete application.

(b) *Notice of disapproval of application or cancellation of permit.* Upon disapproving an application or canceling an issued permit for any of the above reasons, the buildings manager shall:

(1) Notify promptly the applicant or permittee in writing of disapproval or cancellation and the reasons for this action; and

(2) Inform the applicant of his or her right to appeal the disapproval or cancellation to the regional officer under § 101-20.704.

§ 101-20.704 Appeals from disapproval of application or cancellation of permit.

(a) *Time for appeal.* Within 5 calendar days of notification of the buildings manager's decision to disapprove any application or cancel an issued permit under § 101-20.703, the applicant or permittee may appeal the buildings manager's determination to the regional officer by notifying the regional officer, in writing, that he or she desires to appeal.

(b) *Record.* Although a trial-type hearing or presentation is not required, the applicant or permittee and the buildings manager shall have the opportunity to orally state the reasons that the application or cancellation should or should not be approved. Written materials and documents may also be submitted. The regional officer shall affirm or reverse the buildings manager's determination based on this information.

(c) *Time for review.* The regional officer shall affirm or reverse the buildings manager's determination within 10 days of the date on which the regional officer received the

applicant or permittee's notification of his or her desire to appeal. If the regional officer does not rule within this period, the application will be considered to be approved or the permit validly issued.

(d) *Notification.* Upon reaching a decision on an appeal taken under § 101-20.704, the regional office shall promptly notify the applicant or permittee and the buildings manager of the decision and the reasons therefore.

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